Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1285

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JAMES TESTA and EUGENE RIGGIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No.

THE PEOPLE OF THE STATE OF NEW YORK,

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JAMES TESTA and EUGENE RIGGIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The History of the Case

By Kings County Indictment No. 3567/1969, filed on August 12, 1969, respondents James Testa and Eugene Riggio, together with one Michael McCarthy, were accused of the crimes of Robbery in the First Degree, Grand Larceny in the Second Degree, and two counts of Assault in the First Degree. All defendants were convicted of all counts of the indictment after a trial by jury, and were sentenced to imprisonment (McGrover, J.).

Respondents perfected independent appeals to the Appellate Division for the Second Judicial Department of New York. By an order dated May 19, 1975, upon a memorandum opinion, that court unanimously reversed respond-

ent Testa's judgment of conviction (see Appendix A, *infra*). By an order dated October 20, 1975, Eugene Riggio's judgment of conviction was reversed by the Appellate Division (see Appendix B, *infra*).

Thereafter, by permission of Hon. Sol Wachtler, Associate Judge of the Court of Appeals of New York, petitioner appealed from both orders of the Appellate Division. The appeals were consolidated for argument. On December 20, 1976, an order was entered by which the Court of Appeals, upon a memorandum opinion, unanimously affirmed the orders of the Appellate Division (see Appendix C, *infra*).

Petitioner now applies for a Writ of Certiorari to the Court of Appeals of the State of New York to review the aforementioned order of that court.

Opinions Below

The opinion of the Appellate Division, Second Department in *People* v. *Testa* is reported at 48 App. Div. 2d 691 369 N.Y.S. 2d 296. The opinion of the Appellate Division in *People* v. *Riggio* is reported at 49 App. Div. 2d 928, 375 N.Y.S. 2d 837. The opinion of the Court of Appeals in the consolidated action is reported at 40 N.Y. 2d 1018, —— N.E. 2d ——, —— N.Y.S. 2d ——.

Jurisdiction

The jurisdiction of this Court to issue the Writ of Certiorari sought herein is conferred by 28 U.S.C. 1257 (3). See *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975).

Questions Presented

1. Whether the Due Process Clause requires the prosecutor in a State criminal proceeding to disclose to the defense statements made to federal law enforcement agents by a person subsequently called as a defense witness, where the federal agency dismissed charges prior to the State prosecution.

2. Whether the determination by the Court of Appeals that the Due Process Clause requires disclosure of statements made to law enforcement agents by a person subsequently called as a defense witness has so significantly misconstrued the Fourteenth Amendment as to make this case worthy of review by the Supreme Court.

Constitutional Provisions at Issue

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Statement of Facts

On May 5, 1969, an aborted hijack-robbery took place in Brooklyn, New York. Respondents James Testa and Eugene Riggio, Michael McCarthy, and another were arrested on May 7th of that year by the Federal Bureau of Investigation in connection with the incident. Following an investigation by the F.B.I., these charges were dis-

missed. Respondents and McCarthy were thereupon arrested on State charges based upon the attempted robbery.

An indictment charging respondents and McCarthy with robbery, larceny, and two counts of assault was filed on August 12, 1969. In the course of pre-trial proceedings, counsel for the defendants requested certain reports prepared by the F.B.I. in the course of its investigation. In particular, the defense sought disclosure of reports incorporating statements made by potential alibi witnesses for the defense. The trial court denied the defendants' motion with respect to those statements, while ordering the prosecution to disclose all exculpatory material.

The defense renewed its motion at trial, with no further success. Copies of the defendants' statements to federal authorities, as well as other reports containing exculpatory information, were provided to the defense. However, other reports were withheld, including one pertaining to the interview, three days after the incident, of a person claimed by respondent Testa as verifying his alibi statement to federal authorities. This person, Peter Athenerides, provided information lending some support for Testa's statement.

Following the presentation of the People's case, each defendant presented an alibi defense. Respondent Testa, while not taking the stand himself, offered testimony that he had been selling fruit and vegetables in Queens at the time during which the offense took place. To support his alibi, he called as a witness Peter Athenerides.

Athenerides did testify that he had seen Testa selling fruits and vegetables in Queens, but was unable to specify the precise date that this occurred. The statement made three and one-half years earlier by Athenerides to the F.B.I., which was withheld by the prosecution, revealed that he then could state positively that on the date in question he did see a fruit peddler in Queens, but he could not identify Testa from a photograph as the peddler.

Respondents and McCarthy were found guilty by jury verdict. By a post-judgment motion, the reports at issue were disclosed and the trial court determined that no exculpatory material was contained therein. Respondents were subsequently sentenced and thereafter perfected their respective appeals. Defendant McCarthy did not prosecute an appeal.

Summary of Argument

Petitioner contends that the principles set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1963) were incorrectly applied in the court below. In reversing a judgment of conviction on the grounds of non-disclosure of prior statements of a defendant's witness, the court significantly deviated from the principles set forth in *Brady*. Furthermore, in holding that dismissal of federal charges indicated the existence of exculpatory material in the federal investigatory reports, the court below appeared to overlook the fundamental premise that prosecutorial discretion allows for a decision to decline prosecution totally independent of the discovery *vel non* of exculpatory information.

These misconstruals of the Due Process Clause of the Fourteenth Amendment, it is submitted, merit correction by the Supreme Court.

POINT I

The Reports Prepared by the Federal Bureau of Investigation Contained No Exculpatory Material Not Otherwise Available to the Defense. As Such, Disclosure Was Not Compelled by the Mandate of the Due Process Clause of the Fourteenth Amendment.

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), this Court enunciated the requirement of disclosure of exculpatory information under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. There, it was held that due process requires disclosure by the prosecution to the defense of any evidence favorable to the accused where material to the issues of guilt or punishment. *Brady* v. *Maryland, supra*, at 87.

Consonant with the principles underlying *Brady* is the proposition that where favorable evidence is available to the defense, due process does not require further disclosure of such evidence. For example, in *Maglaya* v. *Buchkoe*, 515 F. 2d 265 (6th Cir.), *cert. den.* 423 U.S. 931 (1975), the trial court denied discovery by the defense of certain psychiatric records tending to demonstrate the mental instability of the major witness for the prosecution. In an appeal from the denial of a postconviction writ of habeas corpus, the Sixth Circuit failed to find a denial of the petitioner's rights to disclosure under *Brady*, stating that ". . . the rights protected under *Brady* v. *Maryland, supra*, are not violated when a defendant in a criminal trial has full knowledge of the existence of the evidence prior to trial and makes no effort to obtain its production. In addition, we note that the facts concerning Logan's prior mental history were exhaustively covered at the trial." *Maglaya* v. *Buchkoe, supra*, at 268-9.

Again, in *United States* v. *Stewart*, 513 F. 2d 957 (2d Cir. 1975), the court was faced with circumstances similar to those in the instant case. There, the prosecution failed to disclose a statement made to the F.B.I. by a co-conspirator, Ruddock, which was arguably exculpatory. However, Judge Lumbard held that

> "Ruddock's identity and alleged participation in the robbery were known to Stewart at least six weeks prior to his first trial. Stewart could have interviewed Ruddock prior to that trial or called him as a witness at that trial. The government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish [citations omitted]." *Id.*, at 960.

See, also, *United States* v. *McMillan*, 508 F. 2d 101 (8th Cir. 1974), *cert. den.* 421 U.S. 916 (1975).

In the case at bar, the defense was clearly apprised of any information contained in the report in question, inasmuch as the report simply incorporated a statement of a witness for the defense. Furthermore, the statement itself merely reiterated in essence the testimony given by the witness at trial. Concededly, the statement did positively set forth the date upon which the alibi witness observed respondent Testa. However, the mere possibility that this statement might thus have been used to refresh the witness' recollection can hardly raise it to the level of 'material' for which *Brady* compels disclosure. Simply because the use of a document may be helpful to the defense cannot compel constitutionally mandated disclosure in an adversary system.

In fact, disclosure of information otherwise known to the defense would not appear to fall within the ambit of

Brady at all. *Brady* prohibits "suppression" of evidence favorable to the accused. Even if the term "evidence" is broadly construed so as to signify non-admissible material which is favorable to the defense, availability of that information to the defense would appear to preclude a finding of "suppression" by the prosecution. This is particularly so where, as here, the non-disclosed information is, in effect, the potential testimony of a defense witness.

This principle is manifested in the analogous area of disclosure of a witness' prior statements after his testimony at trial. In *Rosenberg* v. *United States*, 360 U.S. 367 (1959), the Supreme Court, in interpreting 18 U.S.C. § 3500 (e), held that failure to disclose a prior statement by a witness for the prosecution as required by that section was not reversible where the information contained in the statement was revealed upon examination at trial. The Court stated that "[s]ince the same information that would have been afforded had the document been given to defendant was already in the possession of the defense by way of the witness' admissions while testifying, it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the letter." *Id.*, at 371.

Similar reasoning applies where *Brady* material has been withheld. It can hardly be deemed violative of due process to withhold information which is set forth before the trier of fact in another manner.

Furthermore, the court below appeared to overlook the fundamental premise that prosecutorial discretion allows for a decision to decline prosecution totally independent of the discovery *vel non* of exculpatory information. The opinion of the Appellate Division, adopted by the Court of Appeals by its affirmance, reasoned that the dismissal

of the federal charges arising from the event for which respondents were convicted in the proceedings below raises the presumption that exculpatory material was contained in the F.B.I. file.

This view, however, is totally at odds with the doctrine of prosecutorial discretion. Prosecutorial agents have traditionally been held to possess a broad discretion in determining whether to initiate prosecution. As set forth in *United States* v. *Cox*, 342 F. 2d 167, 171 (5th Cir.), *cert. den.* 381 U.S. 935 (1965), "[t]he discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause." See, also, *United States* v. *Cawley*, 481 F. 2d 702 (5th Cir. 1973). Where, as here, the offense committed violates both federal and State law, these considerations of policy may make appropriate a dismissal of federal charges in order to reserve prosecution for the State.

We submit, then, that the court below fundamentally misconstrued both the principles set forth in *Brady* v. *Maryland, supra*, and the doctrine of prosecutorial discretion in its affirmance of the order of the Appellate Division. As such, the order below should be reversed.

POINT II

The Determination by the Court of Appeals That the Due Process Clause Requires Disclosure of Statements Made to Law Enforcement Agents by a Person Subsequently Called as a Defense Witness Has So Significantly Misconstrued the Fourteenth Amendment as to Make This Case Worthy of Review by the Supreme Court.

As demonstrated in Point I, *supra,* the holding of the Court of Appeals below was erroneous under federal constitutional law. We realize that not every State case wrongly decided under the Constitution is deserving of review by the Supreme Court. We submit, however, that the degree to which the opinion below has distorted the principles of the Fourteenth Amendment makes appropriate a review of this case by the Supreme Court.

The development of the principles of due process as applied to disclosure of exculpatory matter is set forth in *United States* v. *Agurs,* —— U.S. ——, 96 S. Ct. 2392 (1976). There, this Court traced the history of the principles of disclosure culminating in the decision in *Brady* v. *Maryland, supra.* In discussing the various circumstances in which problems of disclosure may arise, the Court stated:

> In the first situation, typified by *Mooney* v. *Holohan,* 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury [footnote omitted]. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair [footnote omitted] . . . In those cases the Court has applied a strict

> standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *United States* v. *Agurs,* —— U.S. at ——, 96 S. Ct. at 2397.

This seems to indicate that the harm to be avoided in disclosure of exculpatory information is the misrepresentation of the facts upon which a jury's decision is based. Clearly, a jury cannot serve its truth-seeking function where the truth [or what is possibly the truth] is being withheld or distorted. Again analyzing the development of the rules of disclosure, the Court in *Agurs* stated that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs, supra,* —— U.S. at ——, 96 S. Ct. at 2398.

Under these principles, reversal on *Brady* grounds is seen as totally inappropriate where the defense is on notice of the exculpatory facts. While the trier of fact is entitled to consider all admissible information relevant to its fact-finding role, no adversarial system can tolerate a rule of due process compelling the prosecution to present evidence of which the defense has notice or over which it exercises control. This proposition, it is submitted, is implicit in the prior opinions of the Supreme Court.

The instant case, in which the holding below deviates from these principles of due process under the Fourteenth Amendment, offers an opportunity for the Supreme Court to bring the law of New York State into accord with federal constitutional law. Furthermore, this case presents an appropriate vehicle by which this Court may definitively state those principles noted above which heretofore have

appeared only implicitly in past opinions of the Court. It is submitted that the Supreme Court should review this case in order to state that due process does not require disclosure of information of which the defense is on notice and which, in fact, is garnered from the statements of a witness for the defense.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be granted.

Dated: Brooklyn, New York
February, 1977

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

PETER A. NORLING
Assistant District Attorney
of Counsel

APPENDICES

APPENDIX A

Order of Reversal of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (James Testa)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 19, 1975.

HON. SAMUEL RABIN,
Acting Presiding Justice.
HON. JAMES D. HOPKINS,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" FRED J. MUNDER,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

JAMES TESTA,

Appellant.

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named James Testa, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered June 1, 1973, convicting him of robbery

Appendix A—Order of Reversal of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (James Testa)

in the first degree, grand larceny in the second degree and assault in the second degree (two counts), upon a jury verdict, and imposing sentence; and the said appeal having been argued by John J. Meglio, Esq., of counsel for the appellant, and argued by Steven Di Joseph of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, and new trial ordered. No questions of fact have been raised or considered.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Opinion of Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (James Testa)

[SAME TITLE]

John J. Meglio,
New York, N. Y.,
for appellant.

Eugene Gold,
District Attorney,
Brooklyn, N. Y.
(Steven Di Joseph of counsel),
for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered June 7, 1973, convicting him of robbery in the first degree, grand larceny in the second degree and assault in the second degree (two counts), upon a jury verdict, and imposing sentence.

Judgment reversed, on the law, and new trial ordered. No questions of fact have been raised or considered.

Appellant was first arrested on May 7, 1969 on federal racketeering charges—to wit, interference with commerce by threats or violence (U. S. Code, tit. 18, § 1951). Specifically, appellant was charged with having participated in an attempt to hijack a trailer on May 5, 1969. After the Federal Bureau of Investigation (F.B.I.) conducted a thorough investigation, the federal charges against appellant were dismissed. Immediately thereafter, he was arrested and subsequently was indicted and prosecuted for the present charges. Before the trial, appellant's counsel moved to examine all of the written material compiled by the F.B.I. during its investigation and supplied by it to the prosecution. The Trial Justice directed the prosecution to turn over to appellant any exculpatory statements in

Appendix A—Opinion of Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (James Testa)

the F.B.I. file which could be evidence at trial, but would not let counsel read all of the F.B.I. records himself. Early in the trial, appellant's counsel moved for the production of specific F.B.I. material, i.e., statements of persons who had been brought to the attention of the F.B.I. by appellant and who would, allegedly, support his alibi. The trial court, without examining the material sought, agreed with the prosecutor that appellant's counsel was not entitled to such material. We disagree.

The rule set down in Brady v. Maryland (373 U. S. 83, 87) is that

> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (See, also, *Moore* v. *Illinois,* 408 U. S. 786.)

The record reveals that, at the trial, the prosecution used the F.B.I. material which had been denied to appellant. This was patently unfair. Justice required that this material should have been made available to the defense (cf. People v. Rosario, 9 NY 2d 286), especially in view of the dismissal of the federal charges following the F.B.I. investigation and in the absence of any claim of privilege. Moreover, where there is some basis in fact for believing that the prosecution may be in possession of evidence favorable and material to the defense, reliance by the court, as here, upon the discretion of the prosecutor to determine what is or is not to be disclosed to the defense is unwarranted (see People v. Bottom, 76 Misc 2d 525).

RABIN, Acting P.J., HOPKINS, CHRIST, BRENNAN and MUNDER, JJ., concur.

APPENDIX B

Order of Reversal of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (Eugene Riggio)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 20, 1975.

HON. HENRY J. LATHAM,
Acting Presiding Justice.
HON. JOHN P. COHALAN, JR.,
" ARTHUR D. BRENNAN,
" FRED J. MUNDER,
" J. IRWIN SHAPIRO,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

EUGENE RIGGIO,

Appellant.

ORDER OF APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named Eugene Riggio, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings

Appendix B—Order of Reversal of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (Eugene Riggio)

County, rendered June 7, 1973, convicting him of robbery in the first degree, grand larceny in the second degree and assault in the first degree (two counts), upon a jury verdict, and imposing sentence; and the said appeal having been argued by Bertrand J. Kahn, Esq., of counsel for the appellant, and argued by Peter A. Norling, of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, and new trial ordered.

No questions of fact have been raised or considered.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Opinion of Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (Eugene Riggio)

[SAME TITLE]

William E. Hellerstein and William J. Gallagher,
New York, N.Y.
(Bertrand J. Kahn of counsel),
for appellant.

Eugene Gold,
District Attorney,
Brooklyn, N.Y.
(Peter A. Norling of counsel),
for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered June 7, 1973, convicting him of robbery in the first degree, grand larceny in the second degree and assault in the first degree (two counts), upon a jury verdict, and imposing sentence.

Judgment reversed, on the law, and new trial ordered. No questions of fact have been raised or considered.

This court's decision in People v. Testa (48 AD2d 691) is controlling and requires a reversal of the conviction.

LATHAM, Acting P.J., COHALAN, BRENNAN, MUNDER and SHAPIRO, JJ., concur.

APPENDIX C

Order Affirming Order of Appellate Division

No. 573

THE PEOPLE &c.,

Appellant,

vs.

JAMES TESTA,

Respondent.

THE PEOPLE &c.,

Appellant,

vs.

EUGENE RIGGIO,

Respondent.

Orders affirmed on the memorandum at the Appellate Division in *People* v. *Testa* (48 AD 2d 691; see also, *People* v. *Consolazio,* 40 N Y 2d 446, 453).

All concur.

Decision Court of Appeals
Dec. 20, 1976